SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U. S.
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No. 71-492

LLOYD CORPORATION, LTD.,
Petitioner,

v.

DONALD M. TANNER, ET AL.,
Respondents.

BRIEF OF PEOPLE'S LOBBY, INC., AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

On Writ of Certiorari To The United States Court of Appeals For The Ninth Circuit

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state law to prohibit any use of their property by others without their consent. However, unlike the situation involving a person's home, no meaningful claim to protection of a right of privacy can be advanced by respondents here. Nor on the facts of the case can any significant claim of protection of the normal business operation of the property be raised. Naked title is essentially all that is at issue."

No greater interference with Lloyd Corp.'s property rights and the ordinary uses of its property are evident in this case than the picketing and handbilling by the union members in *Logan Valley*.

To permit shopping center owners to prohibit peaceful and orderly communication to the public by distribution of handbills on the functional equivalents of public sidewalks of a business district would be a large step backward in the protection heretofore afforded by the First and Fourteenth Amendments to freedom of speech and press for all people.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit in this case should be affirmed.

Respectfully submitted,

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BRIEF OF PEOPLE'S LOBBY, INC., AS AMICUS CURIAE, IN SUPPORT OF RESPONDENTS

This amicus brief is filed by People's Lobby, Inc. ("People's Lobby") pursuant to written permission of counsel for petitioner (who gave his consent after this Court granted the motions of Homart Development Co. and American Retail Federation) and counsel for respondents.

INTEREST OF THE AMICUS CURIAE

People's Lobby is a non profit California corporation consisting of volunteer citizens who utilize California's initiative process for the purpose of direct legislation. For the

purpose of direct legislation. For the past two and one half years People's Lobby has conducted anti pollution campaigns through litigation and the initiative process.

Simply stated, the initiative process in California consists of the placement of proposed legislation on the statewide (or county or city) ballot for voter approval by the collection of thousands of registered voters' signatures on petitions containing the legislative proposal.

The People's Lobby launched its first campaign in August 1969 by attempting to place two environmental measures on the June or November 1970 statewide ballot. In order to collect the required number of signatures (520,000 for the proposed state constitutional amendment and 325,000 for the proposed statute amendments) in the short period allowed by law (150 days) People's Lobby volunteer petition carriers were forced to go where substantial numbers of persons frequented on foot, e.g., shopping centers. Thus, Inland Center, a huge 75 store shopping center located in San Bernardino County and owned by Homart Development Co., became the site of signature gathering until People's Lobby volunteers were compelled to leave in October 1970. That prompted the filing to enjoin interference with the right to collect signatures on the premises of Inland Center, which was rejected first by the Superior Court, and then by the Court of Appeal, Fourth Appellate District, *Diamond v. Bland*, 87 Cal. Rptr. 97 (1970). In the meantime the signature drive ended in failure and the measures did not appear on the ballot.

Nevertheless, People's Lobby pursued the matter in the California Supreme Court because of its intention to try again. On December 7, 1970 a new initiative drive was launched to qualify the "Clean Environment Act" for the next general statewide election. This new

drive was mentioned by the California Supreme Court on December 16, 1970 when it reversed the Superior Court decision (the Court of Appeal decision having previously been vacated when the Supreme Court originally granted a hearing) and held that the People's Lobby did in fact have the right, subject to reasonable regulation, to go onto the premises of Inland Center for the purpose of the peaceful and orderly gathering of signatures on petitions and dissemination of information in connection therewith:

> "...[P]laintiffs have filed a new petition with the Secretary of State and have announced resumption of a campaign to qualify an initiative measure for the next state election."
>
> *Diamond v. Bland*, 3 Cal.3d 653, 657(1970).

Greatly assisted by this decision, the People's Lobby proceeded to gather over 326,000 valid signatures of registered voters and in May 1971 the Clean Environment Act qualified for the June 6, 1972 California statewide election. During the signature gathering campaign throughout California hundreds of volunteer petition carriers went forth to gather the signatures of fellow citizens who, dissatisfied with the failure of the California legislature to enact meaningful environmental legislation, eagerly signed the Clean Environment Act petitions. The drive was conducted peacefully and without the violence a frustrated public might engage in if denied the opportunity to participate in the direct democratic process of the initiative.

Just as the respondents in *Homart Development Co. v. Diamond*, cert. den. 402

U.S. 988 (May 17, 1971) acted peacefully and orderly at all times, voluntarily leaving the premises of Inland Center when requested to do so, and then seeking redress in the courts, other People's Lobby volunteers have also acted peacefully.

In summary, the interest of the People's Lobby lies in its utilization of large commercial shopping centers not unlike the one involved in the instant case. A decision adverse to respondents herein could very well terminate the People's Lobby's initiative activities in California.

ARGUMENT

I

THE FIRST AMENDMENT PERMITS ORDERLY AND PEACEFUL HANDBILLING, PICKETING, AND SIGNATURE GATHERING ON PRIVATE PROPERTY WHICH HAS BEEN GENERALLY OPENED TO THE PUBLIC

Once this Court's decision in *Marsh v. Alabama*, 326 U.S. 501 (1946) is accepted as valid precedent, it must then be recognized that, like most constitutional litigation, a balance must be struck that will accomodate the interests of all concerned. In attempting to strike the proper constitutional balance between the First and Fifth Amendments, one must consider not only the benefit to the one side but the detriment to the other.

The benefit to those seeking to engage in First Amendment conduct is easily perceived, especially when the reality of modern day life is recognized. The advent of the automobile and the growth of the suburbs have created a situation wherein most members of the public are accessible only when they leave their automobiles and venture onto shopping center

sidewalks and malls. Persons seeking to communicate with their fellow citizens can no longer reach them except in so far as they are on foot at shopping centers. In California the people drive everywhere. They obviously cannot be contacted in their automobiles. They cannot be reached while they are at work, and more and more homeowners and tenants are prohibiting door to door solicitation, which is much too time consuming in any event. Thus, those seeking to communicate with others greatly benefit when permitted to do so on shopping centers. Without shopping center access, such persons would be effectively prevented from communicating their message. Television, radio, newspaper, and magazine media are beyond the range of most persons who must rely on the shopping center as a forum.

The detriment to shopping center owners is non existent. No one buys less good simply because he has taken the opportunity to sign a petition or receive a leaflet. If a customer goes to a shopping center to purcahse a particular item, there is no reason to suppose he will leave empty handed merely because he read the message on a picket. There would be no detriment if all shopping centers were subjected to the same requirement.

Numerous shopping centers have already been prohibited from denying access to those seeking to exercise First Amendment freedoms, and none have suffered. *Diamond v. Bland*, 3 Cal.3d 653(1970), cert. den. sub nom. *Homart Development Co. v. Diamond*, 402 U.S. 988(1971); *Sutherland v. South Center Shopping Center*, 3 Wash. App. 833(1971); *State v. Miller*, 280 Minn. 566(1968); *Tanner v. Lloyd Corp.*, 446 F.2d 545(9th Cir.1971); *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery*

A reversal by this Court will lead to feelings of frustration and hopelessness on the part of those persons who cannot afford to resort to television, radio, newspapers, or magazines to disseminate their message. Indeed, these "alternatives" are not even available to those like the People's Lobby who come within a particular provision of the First Amendment not capable of being exercised by way of the media: the petition clause.

II

THERE ARE NO REASONABLE ALTERNATIVES

The American Retail Federation, amicus curiae in support of petitioner Lloyd, proposes an unworkable and meaningless rule. It states that First Amendment activities may not be conducted on private premises open to the public unless there are no reasonable "effective alternative means of communication" available.

People's Lobby submits that as a matter of constitutional law there are no reasonably effective alternatives to shopping centers. They have replaced the downtown business district as the center of commercial activity. Those seeking to exercise First Amendment rights go to them because they provide access to large numbers of persons.

The proposed rule would increase litigation and involve difficult fact questions. The proposed rule provides no standards. How would the existence of reasonable alternatives be determined. Who would determine whether they were reasonable? Would, for example, a football stadium with a large crowd on a Sunday afternoon five miles from a shopping center be a reasonable alternative? Would the football fan, rushing to make the opening kickoff or fleeing to "beat the crowd" after

the game be compared to the shopper leisurely strolling through a mall and browsing at the windows?

The proposed rule would apparently require a movie theatre operator to permit First Amendment activity in the premises if there were no other business establishment within a substantial distance.

The rule would make no sense, and could not be applied to the type of activity involved in *Diamond v. Bland*, supra, where the People's Lobby was not merely "communicating" ideas (the speech clause of the First Amendment) but was collecting signatures on environmental initiative petitions (the petition clause of the First Amendment). The "petition clause" is frequently overlooked in discussions involving First Amendment free speech issues. Certainly the right to petition is not the same as free speech: they are mentioned separately in the First Amendment:

> "Congress shall make no law... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (Emphasis added.)

The California Constitution also recognizes the importance of the right to petition, and goes so far as to provide for direct legislation by the people.

Article I, Section 2 of the California Constitution provides as follows:

> "All political power is inherent in the people. Government is instituted for the protection,

security and benefit of the people, and they have the right to alter or reform the same whenever the public good may require it."

Article IV, Section 1 of the California Constitution provides as follows:

"The legislative power of this State is vested in the California Legislature which consists of the Senate and Assembly, but the people reserve to themselves the powers of initiative and referendum."

Article IV, Section 22 of the California Constitution provides in part as follows:

"(a) The initiative is the power of the electors to propose statutes and amendments to the Constitution and to adopt or reject them."

"(b) An initiative measure may be prepared by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the voters for all candidates for Governor at the last gubernatorial election"

...

In California the figures are generally 325,000 signatures for statute initiatives and 520,000 signatures for constitutional

initiatives. California Elections Code Section 3507 provides that all signatures must be gathered within 90 days, and Section 3520 provides for a supplemental period of 40 days. Other provisions of the Elections Code provide for the possibility of an additional 20 days. Accordingly, at the most, People's Lobby, and other groups seeking to "petition the Government" by the California initiative process are afforded 150 days to gather the necessary signatures of registered voters. Experience has indicated that approximately 1/3 of all signatures gathered are invalid, which means substantially more than the numbers mentioned above must be gathered within 150 days to qualify a measure for the ballot.

The great number of signatures required and the short period of time alloted render illusory any contention that alternative means of communication may preclude access to shopping centers. The California Supreme Court recognized this in *Diamond v. Bland*, 3 Cal. 3d 653, 660, n.2:

> "Defendants also attempt to distinguish *Marsh* by insisting these plaintiffs can assert their First Amendment rights by means of mass media. It seems evident that mass media are particularly inappropriate for plaintiffs' purposes: no one has suggested how signatures can be obtained on initiative petitions by means of newspapers, radio, or television."

When petition circulation is involved it is meaningless to consider alternatives. Generally, all available locations must be used, and time pressures dictate that shopping centers, with their large number of persons on foot, be visited.

People's Lobby recognizes that the California initiative process is not necessarily coextensive with rights protected by the First Amendment. Nevertheless, for all practical purposes the right to petition is similar to California's initiative petition right because both involve the need for face to face contact. While non initiative petition campaigns do not necessarily have built in legal time limitations, they do nevertheless require speedy action. To show the President of the United States or Congress concern for a particular issue within a reasonable time after its occurence it is important for a citizen or an organization to collect thousands of signatures in a short period of time.

It should be pointed out that the right to petition differs from handbilling in that no litter is created because no literature is generally distributed.

Shopping center owners who have, by local zoning laws and building permits, been permitted by local governments to establish huge commercial centers which attract the public from downtown businesses, should not be permitted to prevent access to such persons who were formerly accessible in the downtown areas. If shopping center owners wish to bring the public to their premises by the thousands, they should be obligated to allow those members of the public to continue to exercise First Amendment freedoms formerly exercised at the downtown business district.

It should be noted that the First Amendment includes the right to receive information as well as the right to disseminate it, *Lamont v. Postmaster General*, 381 U.S. 301 (1965), and presumably the right to sign petitions as well as the right to

Worker's Union, 61 Cal. 2d 766(1964), cert. den. 380 U.S. 906(1965).

Indeed, there are numerous non-shopping cases wherein courts have ruled in favor of those seeking to exercise First Amendment rights on various kinds of property: *In re Lane*, 71 Cal.2d 872(1969)(labor union activity at single freestanding store); *In re Hoffman*, 67 Cal.2d 845(1967)("unrelated speech" in enclosed railroad station owned by three private railroad companies); *In re Wallace*, 3 Cal.3d 289(1970)("unrelated speech" within county fairgrounds open only upon payment of fee); Wolin v. Port of New York Authority, 392 F.2d 83(2nd Cir.), cert. den sub nom *Port of New York Authority v. Wolin*, 393 U.S. 940 (1968)("unrelated speech" in enclosed bus terminal); *Brayshaw and People's Lobby v. Sears, Roebuck and Co.*, California Superior Court (Los Angeles County), WEC 24032("unrelated speech" at single free standing store).

Reversal by this Court of the instant case can only lead to confusion and chaos for it is clear that the public believes that First Amendment activities may be conducted at those premises where substantial numbers of persons congregate in a manner that permits such activities without interference with or obstruction to other activities.

Voter registrars, volunteer leaflet distributors, petition circulators, and others who have, at various times, gone onto "private property" such as parking lots, shopping center malls, county fairgrounds for the noble purpose of communicating ideas to their fellow citizens, will be shocked if this Court, at this late date, tells them that they have been guilty of criminal trespass and ought not to repeat their past transgressions.

The rule suggested by the American Retail Federation also ignores this Court's admonition in *Schneider v. State*, 308 U.S. 147, 163 (1939): One is not to have the liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."

III

REGULATIONS SHOULD NOT BE IMPOSED BY BUSINESS ESTABLISHMENTS

People's Lobby obviously concedes that all First Amendment activities must be peaceful and orderly. That is true whether they are conducted on private property or public streets. However, existing laws already prevent the disruption or disturbance of the peace. Anti litter ordinances already exist. If more laws are needed, the local governing bodies may adopt them. These laws are applicable to private property as well as public property.

The state or municipality involved rather than a private, self interested property owner should adopt the rules or regulations in order to permit citizen participation in the promulgation of such rules and regulations. Otherwise, persons seeking to exercise First Amendment rights will be subjected to prior restraints. In *People v. Brayshaw*, No. A-332 (California Superior Court, Riverside County), a petitioner solicitor for the People's Lobby was convicted of criminal trespass for refusing to agree in advance to certain regulations. The conviction was reversed because the regulations were found to be unreasonable. In the meantime the solicitor was denied access to a large shopping center.

People's Lobby would still prefer a decision permitting the shopping centers to enact reasonable regulations than a decision permitting them to absolutely bar First Amendment activities from their premises.

Shopping centers are not incapable of promulgating regulations. Indeed, in response to the numerous decisions previously mentioned, shopping centers have developed rules to govern conduct on their premises, and no significant problems have resulted therefrom.

Since this Court's decision in *Amalgamated Food Employees vs. Logan Valley Plaza, Inc.*, 391 U.S. 308(1968), First Amendment activities have been conducted on numerous shopping centers throughout the country without incident. Many people, in fact, believed that this Court's decision in *Logan Valley* covered all First Amendment activity, and was not limited to labor union picketing. The public will surely be surprised if this Court abruptly halts a tradition consistent with the spirit and purpose of the First Amendment.

CONCLUSION

For the reasons stated herein as well as those urged by Respondents, the Court is requested to affirm the decision of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Roger Jon Diamond, declare as follows: I am an attorney at law duly admitted to practice before the Supreme Court of the United States, and I am the attorney for amicus curiae People's Lobby, Inc., with respect to the accompanying Amicus Curiae brief.

On March 31, 1972, pursuant to Rule 33 of the Supreme Court Rules, I caused the within Brief of People's Lobby, Inc., as Amicus Curiae to be served on Petitioners, Respondents, and amici curiae American Retail Federation and Homart Development Co. by placing three copies thereof enclosed in a sealed envelope with first class postage thereon fully prepaid, in the United States mail at Los Angeles California, addressed as follows:

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Executed on March 31, 1972 at Los Angeles, California

Roger Jon Diamond

Roger Jon Diamond